Teaching Perspectives on Prisoners' Rights

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I

INTRODUCTION

"Prisoners' rights" and "corrections law" have by now become summary expressions for the vast amalgam of problems and issues that arise in the criminal justice system from the point of pretrial imprisonment to the termination of incarceration. Until recently, the instructional material in this area has usually focused on the subject from a limited perspective by concentrating on the areas of criminal liability and the procedures leading to a judgment of conviction or acquittal. Over the past five years, however, the subject of prisoners' rights and remedies has achieved a growing recognition, especially in federal court litigation,1 and this trend is reflected in a changed law school curriculum. The literature in the field of corrections law has not been untouched by these developments. A representative sampling is provided by three recent books—Michele G. Hermann and Marilyn G. Haft's Prisoners' Rights Sourcebook: Theory, Litigation, Practice; Sheldon Krantz's Cases and Materials on the Law of Corrections and Prisoners' Rights; and Leonard Orland's Justice, Punishment, Treatment: The Correctional Process.

II

PRISONERS' RIGHTS SOURCEBOOK: THEORY, LITIGATION, PRACTICE

Hermann and Haft's Sourcebook is a series of articles by some 35 contributors, including such familiar names in the field as William Bennett Turner, Haywood Burns, Martin Sostre, Herman

Schwartz and Jack Weinstein. The collection embraces legal, historical, sociological and political perspectives on the correctional field—an ambitious and admirable scope. Beginning with a general discussion of the prison as an institution, various authors examine the legal and procedural aspects of litigating prisoners’ rights suits, the problems of special groups of prisoners and future trends in prisoners’ rights. A close look, however, reveals significant shortcomings.

Although many of the articles are well done, the editors have not always shown care in selecting and introducing them. For example, the chapter entitled “The Criminal Justice System” contains only two articles, which discuss very limited aspects of what the broad caption promises. In section II, covering the substantive aspects of prisoners’ rights litigation, there is an article by Stanley Bass, First Amendment Rights, which, though amply footnoted, neither provides nor provokes serious analysis. The author merely mentions certain areas of prisoner law which are “ripe for litigation” (p. 73), such as visitation, voting and unionization rights. Also in section II, the editors introduce what could have been a most interesting chapter on pretrial prison conditions with an article they characterize as “short but comprehensive” (p. 123). Unfortunately for the reader, however, only the former judgment is correct. Substantially all that the five-page article does is to amplify the major emphasis of Sourcebook—conclusory rhetoric on the rights of prisoners. The author states:

[I]t would be a mistake to concentrate reform efforts merely against the internal conditions of local jails. It is also essential that workable programs be devised in every jurisdiction whereby most accused persons awaiting trial are permitted to remain at liberty until their cases are finally adjudicated. In addition, speedy trials and competent representation must be made a reality (pp. 125-26).

Except for mentioning these three critical problem areas for pretrial detainees, the author has said amazingly little by way of analysis or evaluation. The student is not presented with enough objective information to discern the issues on his own—perhaps a natural tendency in secondary sources, but one which does not excuse conclusory rather than explanatory writing.

Relatively speaking, the best sections of Sourcebook are those on litigation, special groups in prison and prospective developments. Section III provides some intelligent suggestions on litigating prisoners’ rights suits, particularly in an article on litigation in prison-crisis situations. Section IV, which contains chapters on the special problems of criminally insane, juvenile, female and Spanish-
speaking prisoners, reinforces the editorial emphasis on emerging prisoners' rights issues. The last-mentioned chapter, for example, presents a section 1983 class action complaint on behalf of Spanish-speaking inmates alleging, inter alia, fifth, eighth and fourteenth amendment claims (pp. 388-402). A careful examination of this document will permit the student to exercise original thought, both on the claims presented and on the preparation of and procedures for litigation. Section V, dealing with trends for the future, also offers some thought-provoking material which suggests areas of reform for administrators, legislators, jurists and prisoners. Finally, the book contains a selection of actual documents used in litigating prisoners' civil rights claims, including forms for pro se prisoner actions.

The editors themselves state that Sourcebook is not a casebook (p. xiii). But this disclaimer should have permitted a fuller analysis of other available primary sources. Instead, the editors engage in secondary discussions which are largely elementary, overly general and inadequately documented. They realize that their treatment of the subject is not objective:

It is important to note that many of the discussions contained herein, particularly in the legal areas, concentrate on the favorable decisions in the prisoners' rights area and do not extensively cite or analyze cases where the prisoner has not prevailed (p. xiii).

What, then, was the editors' fundamental intention? Perhaps one might best characterize the book as a "call to action." Sourcebook emphasizes many crucial issues in prisoners' rights, but its usefulness for instructional purposes is severely limited. It may serve as a satisfactory reference for a college survey course on prisoners' rights or for the elementary legal instruction of the pro se prisoner or interested layman. It is of negligible value, however, as a law school textbook.

III

CASES AND MATERIALS ON THE LAW OF CORRECTIONS AND PRISONERS' RIGHTS

Cases and Materials, like Sourcebook, describes the law of corrections and prisoners' rights from many perspectives. But the similarity ends there. Cases and Materials is a self-contained course on prisoners' rights and remedies. Professor Krantz provides a broad overview of the subject, while also raising most of the major and minor issues in correctional law. For example, whereas Sourcebook contains only minimal examination of sentencing, Cases
and Materials—in a 200-page section—offers text and commentary on the objectives of sentencing, disparity and individualized justice in sentencing, the impact of the plea bargaining process on sentencing and procedural protections in the sentencing process.

Cases and Materials is also noteworthy for its objectivity. In part, this derives from the wide variety of primary and secondary materials used. Unlike Sourcebook, which attempts to coordinate various portions of corrections law in neatly packaged articles, Cases and Materials permits the reader to synthesize. Moreover, Krantz provides extensive questions and notes which assist the reader in relating the many issues to broader problems.

One of the book's important features is its comprehensive investigation of prisoners' constitutional rights, as well as the timely issue of executive pardon. There is also a discussion of a frequently forgotten aspect of the prisoners' rights issue—the legal and ethical responsibilities of all participants in the criminal justice system, including prisoners themselves. Throughout the book there are also proposals for reform. While Sourcebook sets goals without discussing how to realize them, Cases and Materials presents concrete alternatives in a variety of areas—plea bargaining, the civil rights and privileges of convicted criminals, the right to treatment in a correctional setting and existing judicial remedies—and lets the reader choose the best course of action.

One specific comparison between Sourcebook and Cases and Materials that should not go unobserved is their different treatment of prisoners' remedies. Sourcebook has no organized, comprehensive discussion of the methods by which the prisoner may obtain relief. This is not to say that it totally neglects the issue. In Federal Jurisdiction and Practice in Prisoner Cases, for example, William Bennett Turner concludes that

[j]urisdictional problems today pose less of a bar to prisoners' rights litigation in the federal courts. . . . [O]n the whole it can be hoped that the day when the courts erect jurisdictional obstacles to avoid consideration of the merits of prisoners' lawsuits has passed (p. 249).

Undoubtedly it can be so hoped. Many state prisoners probably do so day and night. But a conclusion that state prisoners in New York, Connecticut and Vermont, for example, could go directly to

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2 For a useful supplement to other books on prisoners' rights, see MODEL RULES AND REGULATIONS ON PRISONERS' RIGHTS AND RESPONSIBILITIES (S. Krantz, R. Bell, J. Brant & M. Magruder eds. 1973). Cases and Materials excerpts liberally from this work.
federal court on section 1983 claims would clearly come as a surprise to them. Current Second Circuit case law unambiguously provides, absent exceptional circumstances, for the contrary.\(^3\) Sourcebook's editors show too much optimism and too little realism when they point out that "[f]ederal courts may be reluctant to act on suits which will be determined by state courts" (p. xvi) (emphasis added).

Cases and Materials, on the other hand, deals with the subject of remedies in its entirety, including both the potential range of judicial remedies available to prisoners and the requirements for successful judicial action. On the exhaustion of state administrative remedies issue, Professor Krantz urges the reader to consider the requisites to section 1983 prisoner litigation:

Prior to Wilwording [v. Swenson\(^4\)], it was assumed that even under § 1983 cases, it may be necessary to exhaust effective administrative remedies before filing federal suits. . . . Therefore, if a prisoner could appeal a disciplinary action to a prison administrator, he might be required to pursue this course prior to bringing a § 1983 action as long as this may be an effective remedy. Is this still true after Wilwording? Should it be? (p. 783).

Cases and Materials, therefore, at least suggests that exhaustion of state administrative remedies may be necessary. It will indeed be unfortunate if state prisoners proceeding pro se, who quite often rely upon secondary source material, are misled by Sourcebook and as a result are forced into additional delay in litigating their claims.

Furthermore, even when measured against Sourcebook's relative strengths, Cases and Materials excels. On the problems of special inmate groups, for example, there is an examination of the problems of Black Muslims in prison, with a substantial section of notes and questions. Where Sourcebook's discussion of litigation contained sample forms for section 1983 complaints, discovery and

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\(^3\) E.g., Eisen v. Eastman, 421 F.2d 560, 569 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970). In Eisen, however, the court stated that exhaustion would not be required "where the administrative remedy is inadequate . . . or where it is certainly or probably futile." Id. Subsequent cases have used this exception. See Morgan v. LaVallee, 18 CRIM. L. REP. 2143 (2d Cir. Oct. 14, 1975); Plano v. Baker, 504 F.2d 595, 597 (2d Cir. 1974). Thus the Second Circuit's position on exhaustion may not be long-lived. Indeed, in Plano the court specifically left the Circuit's rule open for reconsideration in a "case requiring that issue to be reached." Id. Moreover, in its 1975 term the Supreme Court will consider a case which directly presents this issue. Burrell v. McCray, 44 U.S.L.W. 3263 (U.S. Nov. 4, 1975) (No. 75-44), granting cert. to 516 F.2d 357 (4th Cir. 1975).

\(^4\) 404 U.S. 249 (1971).
interrogatories, *Cases and Materials* presents an exhaustive chapter on techniques in challenging prison conditions and treatment of prisoners. Thus, *Sourcebook* provides materials which might be used by clinical students or *pro se* litigants, but *Cases and Materials* allows the student to explore not only the "what" concerning techniques of litigation, but also the "why," the "how" and the "when." This comprehensiveness is augmented with extensive citations on those issues not fully discussed.

IV

**JUSTICE, PUNISHMENT, TREATMENT: THE CORRECTIONAL PROCESS**

*The Correctional Process* adopts a comprehensive approach, encompassing all stages from sentencing through imprisonment to release from prison; in this respect it resembles *Cases and Materials*. *The Correctional Process*, though, focuses on particular topics along the way, such as the legislative structure of sentencing; presentence investigation; the theoretical, historical, and empirical bases for imprisonment; prison life and procedures; judicial review of prison administration; work and educational release; parole and parole revocation; and pardon and postconviction disabilities.

Professor Orland's book provides extensive notes, but no questions, to supplement the principal materials. These notes are selected and edited in such a way that questions would not be necessary, since each supports a particular viewpoint, many of which clash and compete for acceptance. For example, in his notes on probation, Orland includes an excerpt from the American Correctional Association's *Manual of Correctional Standards* on the development of probation, an overview on probation from a presidential commission's report, some general principles on parole eligibility furnished by the American Bar Association and antithetical statements by J. Edgar Hoover and Richard F. Sparks on the effectiveness of probation.

Careful selection and editing is even more apparent in Professor Orland's handling of judicial decisions. In fewer than three pages on good-time credit for jail inmates, for example, he includes the fundamental portions of District Judge Morris Lasker's majority

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5 *AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTIONAL STANDARDS* 20-21 (3d ed. 1966).
7 *ABA STANDARDS RELATING TO PROBATION* 9-10 (1970).
opinion for a three-judge district court in *Royster v. McGinnis*,\(^8\) Circuit Judge Paul Hays's dissent,\(^9\) Mr. Justice Powell's reversal for the Supreme Court\(^10\) and the dissent of Mr. Justice Douglas from that reversal.\(^11\) Thus, instead of being questioned on the essential arguments supporting each viewpoint, the student confronts these views in such a way that he has little choice but to attempt to reconcile them.

Several interesting features distinguish *The Correctional Process* from *Cases and Materials*. First is the nature of the source materials compiled. In addition to more traditional sources, Professor Orland, who is a member of the Connecticut Parole Board, includes regulations, material from prisoner files, and trial and hearing transcriptions. The regulations give the reader insight into the experience and training of some of those in the correctional system. The case studies and accompanying transcriptions—e.g., parole hearing minutes which include the conference of three parole board members outside the hearing of the prospective parolee—enable the reader to penetrate the thought processes of those within the system and to view the correctional process in operation.

The second distinguishing feature is Professor Orland's multidisciplinary approach. His book offers extensive excerpts from social science literature on such subjects as judicial review of sentencing, the effectiveness of penal treatment as determined from particular research studies, the frequency of work release throughout the nation and the nature of executive clemency. This multidisciplinary approach is also evident in an innovative inclusion of first-hand sources. After introducing the nature of prisons with the observations of four prisoners (one of them Ho Chi Minh),\(^12\) Orland includes unique participant-observer reports on the psychological effects of incarceration. He and 18 of his law students spent a weekend at Connecticut's Haddam Jail as part of a special simulation (set up for prospective correctional personnel) of the first two days of an actual prison experience. About being thrown nude into "the hole" five minutes after his arrival at Haddam because of a

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\(^9\) Id. at 981.


\(^11\) Id. at 277-83.

\(^12\) Prisoners' views on classification of inmates, access to the courts via jailhouse lawyers and the differences between "civil" and "penal" institutions are also presented. The vehicle for the presentation for the last of these is the brief of a *pro se* petitioner. For a detailed discussion of the special sensitivities of the *pro se* litigant, see Flannery & Robbins, *The Misunderstood Pro Se Litigant: More than a Pawn in the Game*, 41 BROOKLYN L. REV. 769 (1975).
false report by a guard that he had created a disturbance on the
correctional bus, Orland stated in a debriefing session:

   I was cursing in the hole. Cursing anybody whose name came to
mind. And I really got some kicks out of it. Some satisfaction. And I
think it was when I really started getting colder and colder and I
really thought that they might really not give me a uniform or blan-
ket that I stopped being a brave wise guy and knocked it off. At some
point in time that is, I thought that I really might not get a blanket,
and it was at that point and no sooner that I stopped cursing (p.
278).

One student discerningly reported:

   I think the most important thing I learned was that when I was first
thrown in, I thought that well, here I am in jail, and I didn't distin-
guish between different levels in jail and being outside. There are
two levels in my mind and they are being outside and being inside.
The next morning I got my green slip and my hearing. Then they put
me in a different cell and they were going to take away my food. I
couldn't have any books. Somebody said if you don't knock it off you
go in the hole. I said, what's the difference? Well, I found out. You
learn that there are a thousand different levels of freedom: Having a
mattress and not having a mattress; having a blanket or not, having a
pillow or not, toilet paper or not. All these things are just as impor-
tant as our initial jump from freedom to going inside (p. 278).

   The final factor distinguishing The Correctional Process from
Cases and Materials (and from Sourcebook as well) is its considera-
tion of international correctional law. There are excerpts on trends
in European corrections, lessons from the Swedish correctional sys-
tem and work release policies in other countries, and extensive
reference to the United Nations Standard Minimum Rules for the
Treatment of Prisoners.13

   In the most comprehensive section of The Correctional Process,
Professor Orland concludes with an examination of his own
particular bailiwick—parole. This section comprises nearly one-
quarter of the textual content of the book. It contains excerpts from
Connecticut parole hearings and reports, which encourage careful
examination and discussion of the given case. The section con-
cludes with a similar inquiry into parole revocation proceedings.

   The Correctional Process does not analyze all the issues cov-
ered by Cases and Materials, but it does not claim to do so. That
which it attempts to do, it does well. It provides materials for con-

centrated analysis and discussion of correctional issues, and it undoubtedly will exert a significant influence on readers who might determine policy and law in this area of the criminal justice system.

V

COMPARISON AND CONCLUSION

As a final comparison of the three books, it may be useful to point out which book deals best with particular subject areas. If the standard for comparing the books is comprehensive consideration of the three main stages of the correctional process—preincarceration, incarceration and postincarceration—The Correctional Process and Cases and Materials, which devote equal attention to the three stages, are more comprehensive than Sourcebook, which concentrates on incarceration. If the standard is exhaustive discussion of prisoners' rights and remedies, then Cases and Materials clearly is more useful than either The Correctional Process or Sourcebook, neither of which offers serious examination of prisoners' remedies. If the standard is the degree of consideration given the criminal justice system as a whole, then the reader has a clear choice. Sourcebook limits itself to the prisoner's perspective; Cases and Materials presents this viewpoint as well as competing opinions within the larger context of the American criminal justice system; The Correctional Process adds an international dimension.

The rights of those we condemn to the isolation, frustration and boredom of prison must be regarded as one of the most challenging areas of American law today. Justice Powell recently observed that "the problems of prisons in America are complex and intractable, and, more to the point, are not readily susceptible of resolution by decree."14 If this is true, we shall need those who will examine the problems carefully and attempt to resolve them intelligently. The student or teacher choosing a text to introduce the issues and their alternative solutions should decide wisely: the quality of lawyers and prison reformers we wish to produce may depend upon this selection.

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